No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AL-PAR, INC.,

Petitioner,

v.

BAIRD & WARNER, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether, where there has been a waiver by the landlord of a use restriction in a lease for nearly five years, the landlord may undo or rescind such waiver?

2. Whether, as a matter of common law contract law, a waiver, once it occurs, is final?

3. Whether the forfeiture of a leasehold interest should be permitted as a result of the tenant's use of the premises where there exist alternative remedies (in the nature of declaratory judgment and injunctive relief) which the landlord has failed to utilize or pursue?

4. Whether the mechanism approved by the Illinois courts for undoing or overcoming waivers comports with procedural due process?

PARTIES TO THE PROCEEDING

The respondent, Baird & Warner, Inc., is the landlord of the premises located at 5301 S. Hyde Park Blvd., Chicago, Illinois. The defendant, Al-Par Inc., rents a store in the building from Baird & Warner, Inc.

The landlord brought this action seeking possession of the premises occupied by Al-Par, Inc., alleging, *inter alia*, breach of the use clause of the parties' lease.

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OCTOBER TERM, 1989

AL-PAR, INC.,

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v.

BAIRD & WARNER, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioner, Al-Par, Inc., petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court, the highest court of the state of Illinois, in this case.

OPINIONS BELOW

The original opinion of the Circuit Court of Cook County (App., *infra*, C1-C2, D1) is unreported. The opinion of the Illinois Appellate Court (App., *infra*, B1-B9) is reported at 183 Ill.App.3d 467, 539 N.E.2d 192, 131 Ill.Dec. 839 (1st Dist. 1989). The Order of the Illinois Supreme Court denying leave to appeal (App., *infra*, A1) is reported (without opinion) at ___ Ill.App.3d ___, 545 N.E.2d 104, 136 Ill.Dec. 580 (1989).

JURISDICTION

The order of the Illinois Supreme Court was entered on October 5, 1989 (App., *infra*, A1). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTORY PROVISIONS INVOLVED

Sections 9-101 and 9-102 of the Illinois Code of Civil Procedure (Ch. 110, §§9-101, 9-102, Ill.Rev.Stat.) are reprinted at App., *infra*, E1.

STATEMENT OF THE CASE

This is a landlord-tenant dispute relating to a commercial premises. Nearly five years into the lease term, and after the tenant had exercised its option to renew for a second five-year term [R. 118-119; Def. Exh. #12], the landlord brought this action under the Illinois Forcible Entry and Detainer Act (Ch. 110, §9-101, et seq., Ill.Rev. Stat.), seeking possession of the premises.

The landlord claimed that the tenant was in breach of the lease in that the tenant had used the premises for a purpose other than that specified in the parties' lease (*i.e.*, other than as a "health and beauty aide store").

Following a bench trial,

> [t]he trial court found that although there appeared to be tacit *waiver*, for almost five years, of the use provision, plaintiff's letter demanding strict compliance negated the waiver.
>
> *See*, 539 N.E.2d at 194, 131 Ill.Dec. at 841 (App., *infra*, B5) (emphasis added).

Nevertheless and notwithstanding its finding that the term "health and beauty aide store" was ambiguous [R. 112], the trial court entered judgment for possession in favor of the landlord. [R. 246.]

On review, the Illinois Appellate Court indicated that:

> The *sole issue* presented for review is whether the trial court erred in finding that plaintiff's letter demanding strict compliance with the parties' lease cured any prior *waivers* with respect to use of the premises.
>
> 539 N.E.2d at 193; 131 Ill.Dec. at 840 (App., *infra*, B2) (emphasis added).

With regard to such waiver(s), the occurrence of which is undisputed, the record reflects that:

1. The tenant remodelled the premises from a bicycle shop and took possession on or about February 1, 1983. [R. 43, 72.] The tenant spent "somewhere around $70,000 with all the refrigeration, installation, fixtures, and the sign and remodelling . . . ." [R. 107 (testimony of Albert Parnes, the tenant's president).]

2. Before entering into the lease, Albert Parnes discussed the proposed use of the premises with George Yonan of Baird & Warner. [R. 110 (testimony of Albert Parnes).] According to Mr. Parnes, he described the proposed use to Mr. Yonan "as a discount store similar to [Al-Par's] other stores . . . ." [*Ibid.*] He

also indicated that Mr. Yonan accompanied him in visits to several of Al-Par's other stores. [R.110-111.]

3. The tenant has operated a discount store continuously for five years. [*See*, R. 95-97 (testimony of Emmanuel Tsikalakis), 107-109 (testimony of Albert Parnes).] The exterior sign which has been present for five years identifies the tenant's business as a "discount store." [Def. Exh. #7, #8; R. 95, 116.]

4. The nature of the tenant's use has not changed over the course of its five-year tenancy. [R. 96 (testimony of Emmanuel Tsikalakis), 109 (testimony of Albert Parnes).] Even the landlord's own witness confirmed this. [R. 38 (testimony of John Beal, Executive Director of the Southeast Chicago Commission).]

5. The landlord maintains an office in the building [R.16, 18, 63, 71, 109], and its agents have made purchases from the tenant's store regularly and frequently. [R. 71-72 (testimony of Russell Fleagle, property manager for Baird & Warner), 109 (testimony of Albert Parnes).] Mr. Fleagle, the landlord's property manager for the building at 5301 S. Hyde Park Blvd. from June 1, 1981, through July 1, 1984, testified that he never instructed the tenant to stop selling any items. [R. 77.]

6. After the tenant exercised its option to renew for a second five-year term [R.118-119; Def. Exh. #12], the landlord (on September 30, 1987) sent a letter demanding "full[ ] and strict[ ] compl[iance]" with certain terms of the lease. [Pltff. Exh. #2.] The tenant, through one of its attorneys, responded on October 14, 1987, asserting that the right to enforce the lease provisions specified by the landlord had been waived. [Pltff. Exh. #3.]

7. On November 6, 1987, the landlord served a "Notice to Quit" on the tenant. [Pltff. Exh. #4; R. 13.]

8. On November 18, 1987, the landlord filed a complaint for possession. [R. C4.] The tenant answered and raised affirmative defenses, including waiver. [R. C129-133.]

A bench trial was held on February 3, 1988. On March 25, 1988, the trial court entered judgment for possession in favor of the landlord. [R. C246 (*see*, App., *infra*, D1).] On July 12, 1988, the trial court issued its "Memorandum of Findings of Fact," *nunc pro tunc*, March 25, 1988. [R. C269-272 (*see*, App., *infra*, C1-C2).]

The Illinois Appellate Court affirmed, by written opinion dated March 16, 1989. [*See*, App., *infra*, B1-B9.] A petition for rehearing was denied by the Illinois Appellate Court on June 19, 1989. A "Petition for Leave to Appeal" was filed in the Illinois Supreme Court. The Illinois Supreme Court declined, without written opinion, to accept the case for review on October 5, 1989. [*See*, App., *infra*, D-1.]

REASONS FOR GRANTING THE PETITION

1. A tenant is entitled to procedural due process in connection with the termination of its leasehold interest. *See, e.g., In re Oyster Club of Greenwich Limited Partnership*, 98 B.R. 654 (D. Conn. 1989); *In re C & C TV & Appliance, Inc.*, 97 B.R. 782 (E.D. Pa. 1989). For the reasons stated hereafter, the mechanism approved by the Illinois courts, which allows a landlord to revive a provision of a lease which has been waived (with no time frames or

contest procedures specified), does not comport with or satisfy procedural due process requirements.

2. The decision of the Illinois courts conflicts with common law principles of contract law, as applied and enforced by the federal courts:

> The general rule applied to contracts is that any ground for forfeiture once waived cannot later be revived as a ground for forfeiture. *Garbaczewski v. Vanucci*, 342 Ill.App. 367, 369, 96 N.E.2d 653 [1950]); *Elmore Real Estate Imp. Co. v. Olson*, 332 Ill.App. 475, 76 N.E.2d 204. A lease is a contract between the landlord and the tenant. *Union Guardian Trust Co. v. Colwood Co.*, 6 Cir. 111 F.2d 671.
>
> Since a lease is a contract, the same principle of law is applicable. *The waiver of the right to declare a forfeiture of a lease by a breach is irrevocable and cannot be revived.*
>
> *Perry v. Waddelow*, 145 F.Supp. 349, 350 (E.D. Ill. 1956) (emphasis added).
>
> A landlord's right to terminate a lease for breach of covenant is waived if the lessor does not avail himself of the right or if there is an *unreasonable delay in enforcement thereof.* Any act of the lessor, done with knowledge of the violation of a covenant by the lessee, affirming the existence of the lease and recognizing the lessee as his tenant, or otherwise inconsistent with the intention to declare a forfeiture is a waiver of such forfeiture unless rebutting circumstances are shown. Inasmuch as terminations are not favored, slight acts will be construed as waivers of terminations. 51C C.J.S. Landlord and Tenant § 117(3).
>
> *In re Ferris*, 415 F.Supp. 33, 38 (W.D. Okla. 1976) (emphasis added).
>
> A lessor's failure to enforce the provisions of a lease prevents the lessor from subsequently enforcing those provisions. Thus, *a waived lease provision is for all intents and purposes stricken from the lease.* 17A

C.J.S. "Contracts" § 493. For example, if a lessor consents to an assignment of the lease, it forever waives its right to enforce an anti-assignment provision to prevent a subsequent assignment. 49 *Am.Jur. 2d* "Landlord and Tenant" §422.

> *In re Boogaart of Florida, Inc.*, 17 B.R. 480, 485 (S.D. Fla. 1981) (emphasis added).

3. The decision of the Illinois courts conflicts with common law principles of contract law recognized by the Illinois courts themselves:

> . . . the general rule is that any ground of forfeiture, once waived, cannot later be revived as a cause for forfeiture.
>
> > *Okey, Inc. v. American National Bank and Trust Company*, 96 Ill.App.3d 987, 422 N.E.2d 221, 225-26, 52 Ill.Dec. 540, 544-45 (1st Dist. 1981).
>
> [t]his court has held that a lessor *may not revive grounds for forfeiture which he previously waived* in order to prevent lessee's exercise of an option to purchase. (*Okey, Inc. v. American National Bank & Trust Co.*, (1981), 96 Ill.App.3d 987, 52 Ill.Dec. 540, 422 N.E.2d 221; see also *Perry v. Waddelow*, 145 F.Supp. 349 (E.D.Ill. 1956) (dealing with option to renew a lease).)
>
> > *Steven W. Barrick & Assoc. v. Witz*, 147 Ill. App.3d 615, 498 N.E.2d 738, 101 Ill.Dec. 414 (2nd Dist. 1986) (emphasis added).

4. The result approved by the Illinois courts has the effect of turning a long-term commercial tenancy into a tenancy at will from its outset, notwithstanding the tenant's substantial investment. [*See*, R. 107.] The decision of the Illinois courts will set a harmful precedent. Because the Illinois courts incorrectly concluded that a waiver could be undone, the decision below will encourage landlords to claim variance from the use description contained

in the lease whenever they seek to terminate a tenancy (even though the tenant may be otherwise fully in compliance with the lease and may have used the premises for exactly the same purpose for years). That result is harmful to tenants and to commercial stability.

This is particularly true where there are alternative remedies available to a landlord (other than forfeiture). A landlord can bring an action for declaratory judgment as to what uses are permitted under the terms of a lease or for a determination as to what items may or may not be sold. And a landlord can bring an action for injunctive relief seeking an order barring the sale of items which it believes are beyond the scope of a use clause. *See, e.g., 202 Market Place v. Evans Products Co.*, 824 F.2d 1363, 1367 (3rd Cir. 1987):

> "Forfeitures are odious in law, and are enforced only when there is the clearest evidence that that was what was meant by the stipulations of the parties." *Cleveland v. Salwen*, 292 Pa. at 433, 141 A. at 157. If the tenant was making unauthorized use of the common area, the landlord's remedy was to sue for trespass damages or injunctive relief.

5. The policy of law favors the findings of waivers of forfeitures:

> . . . we must take notice of the long-established principle of law that forfeitures are not favored by the courts and they will readily adopt any circumstances that indicate an intent to waive a forfeiture.
>
> *Waukegan Times Theatre Corporation v. Conrad*, 324 Ill.App. 622, 59 N.E.2d 308, 312 (2nd Dist. 1945).
>
> . . . courts must carefully scrutinize the lessor's motives in forfeiture actions. *Humphrey v. Humphrey*, 254 Ala. 395, 48 So.2d 424 (1950), *American*

Dairy Queen Corp. v. Brown-Port Company, 621 F.2d 255 (7th Cir.1980).

In the Matter of Northwood Industries, Inc., 25 B.R. 210, 214 (W.D. Wisc. 1982).

This is particularly true where, as here, the forfeiture is based on a use by the tenant which has existed (i) from the outset of the lease, (ii) continuously for nearly five years, (iii) where the tenant made a substantial initial investment in order to undertake such use (including the installation of refrigeration equipment, which, in the landlord's view could never be consistent with a "health and beauty aide store"), (iv) where the landlord had full knowledge of the tenant's actual use throughout such five-year period, and (v) where the landlord's forfeiture action did not come until after the tenant had exercised its option to renew the lease for a second five-year term. Under these circumstances, permitting a forfeiture is fundamentally unfair and inconsistent with our system of substantial justice. Due process requires that state procedures not be utilized to add (or add back) provisions to a lease or contract between the parties.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 5, 1989

Mr. Gary A. Weintraub
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Chicago, IL 60606

No. 68938—Baird & Warner, Inc., respondent, v. Al-Par, Inc., petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 27, 1989.

APPENDIX B

183 Ill.App.3d 467
539 N.E.2d 192

BAIRD & WARNER, INC.,
Plaintiff-Appellee,

v.

AL-PAR, INC., Defendant-Appellant.

No. 88-1107.

Appellate Court of Illinois,
First District, Fourth Division.

March 16, 1989.

Rehearing Denied June 19, 1989.

Landlord filed complaint for possession of premises, alleging that tenant was in breach of lease. The Circuit Court, Cook County, George W. Rothschild, J., entered order of possession, and tenant appealed. The Appellate Court, Johnson, J., held that: (1) court's determination that tenant failed to comply with lease requirement that premises be maintained in clean, sightly and healthy condition was not against manifest weight of evidence; (2) trial court did not give unreasonable interpretation to lease by finding that items sold by tenant went beyond restriction in lease limiting use to health and beauty aide store; and (3) landlord's letter demanding strict compliance with lease cured any prior waivers with respect to use of premises.

Affirmed.

* * * * *

Justice JOHNSON delivered the opinion of the court:

This is an appeal by defendant, Al-Par, Inc., from an order of possession entered by the circuit court of Cook County in favor of plaintiff, Baird & Warner, Inc., for the premises located at 5301 South Hyde Park Boulevard in Chicago, Illinois. The sole issue presented for review is whether the trial court erred in finding that plaintiff's letter demanding strict compliance with the parties' lease cured any prior waivers with respect to use of the premises.

We affirm.

On November 16, 1982, defendant executed a 5-year lease with plaintiff for the premises located at 5301 South Hyde Park Boulevard. Defendant was to use the premises as a "Health and Beauty Aide store." The lease provided, in pertinent part, the following:

> "1. Lessee shall pay Lessor or Lessor's agent as rent for the Premises the sum stated above, monthly in advance, until termination of this lease, at Lessor's address stated above or such other address as Lessor may designate in writing.
>
> * * * * * *
>
> 4. * * * Lessee will not allow the Premises to be used for * * * any purpose other than that hereinbefore specified.
>
> * * * * * *
>
> 6. Lessee shall keep the Premises and appurtenances thereto in a clean, sightly and healthy condition, and in good repair, all according to the statutes and ordinances in such cases made and provided, and the directions of public officers thereunto duly authorized, all at his own expense * * *.
>
> * * * * * *

9. Lessee shall not attach, affix or exhibit or permit to be attached, affixed or exhibited, except by Lessor or his agent, any articles of permanent character or any sign, attached or detached, with any writing or printing thereon, to any window, floor, ceiling, door or wall in any place in or about the Premises, or upon any of the appurtenances thereto, without in each case the written consent of Lessor first had and obtained * * *.

* * * * * * *

13. * * * The acceptance of rent, whether in a single instance or repeatedly, after it falls due, or after knowledge of any breach hereof by lessee, or the giving or making of any demand, whether according to any statutory provision or not, of any act or series of acts except an express written waiver, shall not be construed as a waiver of Lessor's right to act without notice or demand or of any other right hereby given Lessor, or as an election not to proceed under the provisions of this lease.

* * * * * * *

19. * * * The Lessor may collect and receive any rent due from Lessee, and payment or receipt thereof shall not waive or affect any such notice, demand, suit or judgment, or in any manner whatsoever waive, affect, change, modify or alter any rights or remedies which Lessor may have by virtue hereof.

* * * * * * *

21. * * * (d) The rights and remedies hereby created are cumulative and the use of one remedy shall not be taken to exclude or waive the right to use another."

Plaintiff alleges that over the course of almost 5 years defendant breached the lease by failing to send rent in advance to a specified address in violation of paragraph 1; using the store to sell a myriad of items outside of health and beauty aide products in violation of the use

provision in paragraph 4; allowing the premises to deteriorate to the extent that members of the community complained about its unsightly appearance in violation of paragraph 6; and displaying various signs without the prior written consent of plaintiff in violation of paragraph 9.

Gregory McGovern, plaintiff's property manager, sent a letter to defendant on September 30, 1987, demanding strict compliance with the lease, specifically paragraphs 1, 4, 6, and 9, by November 1, 1987.

On October 14, 1987, in response to McGovern's letter, defendant's attorneys sent a letter stating that it would send rent payments to the specified address and that the window signs would be removed. Defendant also stated that it was understood that ancillary items could be sold. Defendant denied that the premises were unsightly. Defendant also refused to remove the exterior window signs, claiming that prior approval had been given. Defendant further asserted that plaintiff waived any objections by virtue of the length of time that it had engaged in the complained of activities without notice of disapproval from plaintiff.

Defendant had not complied with plaintiff's demands by November 1. Although late and not sent to the specified address in the letter of compliance, McGovern received a check on November 4. On November 6, McGovern visited the premises to determine whether the violations set forth in the compliance letter had been remedied. After finding that defendant had not taken any steps toward compliance, the November rent check was returned and a 10-day Notice to Quit was served on defendant.

On November 17, McGovern reported that defendant had not vacated the premises. At that time, a video tape was taken of the exterior of the store which showed that

some of the signs were still in place. Further, various items of merchandise were visible in the store's window, giving it a cluttered appearance.

McGovern further reported that both the interior and exterior of the premises remained in the same unsightly condition. Items, he noted, that were not health and beauty aide related *e.g.*, motor oil, lottery tickets, charcoal, groceries, household cleaners, electronic equipment, were still being sold.

Plaintiff filed a complaint for possession of the premises on November 18, alleging that defendant was in breach of paragraph 1, 4, 6, and 9 of the lease.

Trial was held on February 3, 1988. On February 9, final arguments were heard. The trial court found for defendant with respect to violation of the rent provision in paragraph 1. On March 25, the trial court entered an order in favor of plaintiff for possession of the premises. On July 12, the trial court issued a memorandum of findings *nunc pro tunc*. There were no written findings with respect to the unapproved signs.

The trial court found that although there appeared to be tacit waiver, for almost five years, of the use provision, plaintiff's letter demanding strict compliance negated the waiver. The court noted that there was no real attempt at compliance with the use provision. The court pointed out that paragraphs 13, 19, and 21(d) in the lease provided that waivers by the lessor were not continuous and may be negated by a demand for strict compliance, such as the letter plaintiff sent defendant.

Based on videotapes and witness testimony presented by both parties, the trial court also found that defendant failed to comply with the lease requirement that the prem-

ises be maintained in a clean, sightly and healthy condition. There was no compliance even after the demand for strict compliance had been made. This factual issue was, therefore, resolved in plaintiff's favor.

An appellate court takes a deferential approach to findings made in the trial court on disputed factual issues, but the scope of review on questions of law is independent, not deferential. (*Havens v. Miller* (1981), 102 Ill.App.3d 558, 567, 57 Ill.Dec. 929, 429 N.E.2d 1292.) The trial court is in a better position to determine the credibility of witnesses. (*Nemeth v. Banhalmi* (1984), 125 Ill.App. 3d 938, 962, 81 Ill.Dec. 175, 466 N.E.2d 977.) The reviewing court will not substitute its judgment for that of the trial court unless an opposite conclusion is against the manifest weight of evidence. *S & D Service, Inc. v. Schubert Condominium* (1985), 132 Ill.App.3d 1019, 1021, 88 Ill.Dec. 163, 478 N.E.2d 478.

We do not find that the court's decision was against the manifest weight of evidence. The trial court looked at each party's videotapes and heard testimony of witnesses presented by both parties. We find that there was sufficient evidence to support the trial court's decision with respect to the cleanliness issue.

The question of law presented for review by this court is whether the trial court erred in finding that plaintiff's letter demanding strict compliance with the lease cured any prior waivers with respect to use of the premises.

The purpose of the lease was limited to a health and beauty aide store. Paragraph 4 provides that the lessee will not allow the premises to be used for any other purpose. Defendant contends that there was no breach since health and beauty aide stores would sell the various miscellaneous items sold on its premises. Defendant asserts

that, from the outset of the lease, these various and sundry items have been sold.

The evidence reveals that defendant sold such items as radios, motor oil, circuit testers, paint brushes, cigarette papers, magazines, lottery tickets, pliers, frozen and canned foods, and radial tire repair kits.

The issue for a reviewing court to decide is not what is the common definition of a health and beauty aide store but whether the trial court's construction of the term in the lease was reasonable based on a consideration of its provisions and language. *Belvidere South Towne Center, Inc. v. One Step Pacemaker, Inc.* (1977), 54 Ill.App.3d 958, 961, 12 Ill.Dec. 626, 370 N.E.2d 249.

We do not find that the trial court gave an unreasonable interpretation to the provision by finding that these items sold by defendant were beyond the use restrictions in the lease. We do, however, find that plaintiff waived enforcement of the use provision prior to the time that plaintiff sent the letter demanding strict compliance.

A lessor may demand strict compliance at a future date even though it did not do so in the past. (*LaSalle National Bank v. Helry Corp.* (1985), 136 Ill.App.3d 897, 904, 91 Ill.Dec. 472, 483 N.E.2d 958.) A landlord may "simply notify the tenant that his actions are not consistent with the lease terms and that further deviations will not be tolerated and will be followed by termination of the lease. [Citations.]" *Steven W. Barrick & Associates v. Witz* (1986), 147 Ill.App.3d 615, 620, 101 Ill.Dec. 414, 498 N.E.2d 738.

In the instant case, a letter of compliance was sent to defendant on September 30, 1987. The letter demanded that defendant cease in selling items that were outside

of the use provision by November 1, 1987. The trial court found that the evidence presented was clear that there was no compliance or even attempted compliance by November 1. Termination of the lease, therefore, was appropriate under the circumstances. *Barrick & Associates*, 147 Ill.App.3d at 620, 101 Ill.Dec. 414, 498 N.E.2d 738.

Defendant argues that letters demanding strict compliance are of no legal significance in cases involving violation of use provisions. This is simply wrong. Plaintiff correctly cites to cases where a demand for strict compliance was effective in nullifying previous waivers of use violations in residential leases. *See, 222 East Chestnut Corp. v. Murphy* (1950), 341 Ill.App. 430, 94 N.E.2d 364 (abstract of opinion); *Burch v. Hickman* (1947), 330 Ill.App. 155, 70 N.E.2d 421 (abstract of opinion).

Next, defendant argues that the test to determine the effectiveness of the waiver is whether the lessor had full knowledge of the lessee's breach. *Okey, Inc. v. American National Bank & Trust Co.* (1981), 96 Ill.App.3d 987, 992-93, 52 Ill.Dec. 540, 422 N.E.2d 221, is cited by defendant for this proposition. *Okey* is distinguishable in that there a demand for strict compliance was not made upon the lessee.

Finally, defendant argues that it would be inequitable and create an unfair advantage to allow plaintiff to take possession after 4½ years into the 5-year lease term after it has exercised its option to renew for a second 5-year term. We do not agree. The most glaring inequity would be to allow a tenant to sell virtually anything in violation of his lease. According to defendant, a landlord would have no recourse since demands for compliance would be ineffective with respect to the use provisions.

In appropriate circumstances equity will enjoin forfeiture. (*Kanter & Eisenberg v. Madison Associates* (1987), 116 Ill.2d 506, 108 Ill.Dec. 476, 508 N.E.2d 1053.) However, where a tenant's wilful acts defy compliance, equity will not interpose to grant relief from forfeiture. *Justine Realty Co. v. American Can Co.* (1983), 119 Ill.App.3d 582, 589-90, 75 Ill.Dec. 50, 456 N.E.2d 871; *Soltwisch v. Blum* (1973), 9 Ill.App.3d 760, 763-64, 292 N.W.2d [sic.] 742; *Barnard v. Hollingsworth* (1948), 336 Ill.App. 228, 232, 83 N.E.2d 372.

For the foregoing reasons, the order of the circuit court of Cook County is affirmed.

AFFIRMED.

LINN and McMORROW, JJ., concur.

APPENDIX C

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

BAIRD & WARNER, INC.,

Plaintiff,

No. 87 M1-744203 v.

AL-PAR, INC.,

Defendant.

MEMORANDUM OF FINDINGS OF FACT

Trial was held February 3, 1988, and final arguments were held February 9, 1988. On March 25, 1988, the Court entered an order in favor of plaintiff, Baird & Warner, Inc., for possession of the premises at 5301 South Hyde Park Boulevard, Chicago. That order was based upon the Court's determination of factual issues as follows:

1. The store lease dated November 16th, 1982 between plaintiff and defendant, Al-Par Inc. provides that the purpose of the lease is limited to "Health and Beauty Aids Store." By its letter of September 30, 1987, the plaintiff demanded that the defendant strictly comply with the terms of the lease, including but not limited to ceasing the sale of groceries, watches, calculators and other items going beyond that purpose.

That letter demanded that the defendant comply with the use clause by November 1, 1987.

The evidence at trial was clear that there was not compliance with the use clause by November 1. The evidence also shows that the defendant or related companies had retail establishments to which transfer of the inventory of items inconsistent with the use clause might have been made, and the Court also observed that the officers of the defendant were sophisticated businessmen who had the benefit of advice of counsel at the inception of the store lease and during the operations under it.

The Court is aware the plaintiff, over the course of the lease, appeared to tolerate non-compliance with the use clause and was of the view that, if properly raised, more time than thirty days for compliance could have been appropriate; however, the evidence was clear that no real attempt at compliance with the use clause was made.

Paragraphs 13, 19 and 21(d) provide that waivers by the landlord are not continuous and that, in effect, any such waiver may be negated by a demand for strict compliance, such as made by the lessor's letter of September 30, 1987.

2. The plaintiff's strict compliance letter of September 30, 1987, also demanded that the defendant comply with the store lease requirement that the premises be kept in a "clean, sighty and healthy condition and in good repair."

The parties presented two video tapes of the premises. The plaintiff's video tape was made November 17, 1987 and the defendant's video tape was made in the middle of December 1987. The November video tape, even though taken outside of the premises, showed a scene that did not meet the requirements of the store lease. There was also supplemental testimony by plaintiff's witnesses as to the condition of the premises.

The defendant's December video tape on the other hand showed premises that were "broom-clean" and in the Court's view, too perfect to be credible in the conduct of an active retail business.

On the basis of the Court's view of the credibility of the video tapes and the witnesses, the Court found that the lease provision had not been complied with after the notice for strict compliance.

July 12, 1988
nunc pro tunc
to March 25, 1988

George W. Rothschild
Judge

APPENDIX D

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

BAIRD & WARNER, INC.,

Plaintiff,

No. 87 M1 744203 v.

AL-PAR, INC.,

Defendant.

ORDER FOR POSSESSION

This Cause coming to be heard after trial on the merits, argument of counsel, and post-trial briefing, and this Court fully advised in the premises,

IT IS HEREBY ORDERED THAT:

1. Judgment is granted in favor of plaintiff for possession of the premises at issue located at 5301 South Hyde Park Boulevard;

2. Execution of this judgment is stayed 30 days;

3. The Court's memorandum opinion will be filed at a later date *nunc pro tunc.*

DATE ENTERED: 3/25/88

D2

/s/ George W. Rothschild
Judge George W. Rothschild

SIDLEY & AUSTIN - 90761
Attorney for Baird & Warner, Inc.
One First National Plaza
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APPENDIX E

STATUTORY PROVISIONS INVOLVED

Ch. 110, § 9-101, Ill. Rev. Stat.

ARTICLE IX. FORCIBLE ENTRY AND DETAINER

PART 1. IN GENERAL

9-101. Forcible entry prohibited

§ 9-101. Forcible entry prohibited. No person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he or she shall not enter with force, but in a peaceable manner.

Ch. 110, § 9-102, Ill. Rev. Stat.

9-102. When action may be maintained

§ 9-102. (a) When action may be maintained. The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided:

* * *

4. When any lessee of the lands or tenements, or any person holding under such lessee, holds possession without right after the termination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise.